

On June 24, 1994 appellant, then a 39-year-old rural mail carrier, filed a notice of traumatic injury alleging that she injured her neck and shoulder in the performance of duty on June 15, 1994. At the time of her injury appellant was earning \$38,491.00 per year or \$740.21 per week. The Office accepted her claim for a cervical muscle spasm. Appellant returned to light-duty work and worked as a supervisor from February 21, 1995 through October 4, 1996.

Appellant filed a notice of recurrence of disability on September 25, 1996. She stated that she worked as a general clerk and a supervisor with a lifting limitation of 30 pounds. She continued to experience pain and stiffness in her neck and shoulder. The employing establishment alleged that she filed the recurrence claim in response to its decision to end her work as a supervisor. Appellant stopped work on October 10, 1996 and was earning \$38,767.00 per year or \$745.52 per week. A personnel notification dated October 26, 1996 listed appellant as a 44K step 5 earning \$37,541 per year. Appellant worked as a modified rural carrier from November 4 to December 11, 1997. She then worked limited duty until January 10, 1998.

On February 15, 1997 appellant received a notification of personnel action of 44K step 6 earning \$37,889.00 per year. In a letter dated May 14, 1997, appellant requested that her pay be adjusted to 47K route at step 6. A notice of personnel action dated June 7, 1997 listed appellant as rural carrier 44K step 6 earning \$38,248.00 per annum.

The Office expanded appellant's claim to include temporary aggravation of spondylosis and accepted her recurrence of disability.

Dr. Louis J. Provenza, an attending Board-certified neurosurgeon, provided appellant's work restrictions as lifting up to 20 pounds intermittently and 10 pounds continuously, sitting 5 hours a day, and driving a motor vehicle 5 hours a day. On June 4, 1997 appellant accepted a light-duty position of modified distribution clerk complying with these restrictions. She returned to work on June 9, 1997 earning \$19.12 per hour.

On June 26, 1998 appellant alleged that she was not paid at the correct rate. She stated that her hourly salary should be based on the current rural carrier pay for a "47K at [s]tep 7."

By decision dated August 25, 1998, the Office determined appellant's loss of wage-earning capacity based on her earnings as a modified part-time flexible distribution clerk with wages of \$19.12 per hour. The Office found that as of March 14, 1998 appellant was earning \$19.51 per hour or \$780.40 per week. The Office found that appellant's weekly pay rate was \$745.52.

In a letter dated December 17, 1998, the employing establishment stated that appellant's salary as of June 15, 1994 was \$38,491.00 in a "46K Step 5" rural carrier position. However, the employing establishment noted that this route had been devalued to "\$37,641[.00], to a 43K."

The Office provided appellant with a notice that it proposed to reduce her compensation to zero on February 11, 1999. The Office stated that the August 25, 1998 decision was in error. The Office found that appellant had no loss of wage-earning capacity.

Appellant responded to this proposed reduction on March 4, 1999 and submitted copies of her personnel action forms. She submitted a notice of personnel action effective April 30, 1994 which listed her pay as \$38,491.00 as a step 2 rural carrier working 47 hours, or 47K step 2. On October 29, 1994 appellant was earning \$39,292.00 47K step 3. In a notice of personnel action dated March 23, 1995 appellant's earnings were \$33,456.00 as a 42K step 3. On February 15, 1997 appellant was a 44K step 6 earning \$37,889.00. She stated that she was never totally disabled nor unable to work, but that she continued working until January 10, 1998 at which time the employing establishment refused to offer her a limited-duty position and she

did not return to work until June 6, 1998. Appellant stated that her date-of-injury salary of 47K step 2 was the correct rate of pay for compensation purposes and that she was entitled to all pay increases and step increases.

The Office issued a second notice of proposed reduction of compensation on May 27, 1999. The Office found that appellant's pay rate in the date-of-injury position was \$832.90 per week and that she had a six percent loss of wage-earning capacity. On July 2, 1999 the Office finalized this decision. The Office also issued a decision finding that her weekly pay rate was \$745.52 and that she had a weekly loss of wage-earning capacity of \$44.74 per week.

Appellant requested reconsideration on July 30, 1999. She stated that the current rate of pay for her date-of-injury position was 47K step 9, or \$45,512.00. Appellant also alleged that she lost 10 holiday pay days in her clerk position.

The Office requested a response from the employing establishment, which submitted a copy of appellant's personnel action dated May 11, 1994 and effective April 30, 1994 which listed her hours as 46 and her step as 2 or 46K step 2. Appellant's salary was \$38,491.00. The employing establishment responded on September 10, 1999 and stated that on the date-of-injury appellant's salary was \$38,491.00 and she was graded as a 46K step 2. When appellant returned to work on January 30, 1995 her route had been reevaluated and her salary reduced to \$36,771.00. Appellant worked a detail as an acting supervisor from February 21, 1995 to October 6, 1996.

On September 23, 1999 the employing establishment informed the Office that the current pay rate for a 46K step 2 was \$40,144.00 per year.

By decision dated October 4, 1999, the Office stated that appellant was currently earning \$780.40 per week as a modified distribution clerk. The Office found that her actual earnings fairly and reasonably reflected her wage-earning capacity and that she had no loss of wage-earning capacity. In a separate decision of the same date, the Office found that its July 2, 1999 wage-earning capacity decision was in error and set aside that decision. The Office concluded that appellant's pay rate on June 15, 1994 was 46K step 2, or \$38,491.00. The Office found that the annual pay rate for this position as of August 25, 1998 was \$40,144.00 per year or \$772.00 per week. The Office further found that appellant's actual earnings as of August 26, 1998 were \$780.40 per week. The Office stated that appellant was not entitled to compensation for lost annual steps nor for lost paid holidays.

Appellant requested reconsideration and submitted additional documentation, contending that her rate of pay at the time of injury was \$38,491.00 and that she had salary fluctuations before and after that date. Appellant alleged that while her date-of-injury rate-of-pay was correct, her grade and step information were incorrect. Appellant asserted that she was a 47k step 2 rather than 46K step 2.

Appellant again requested reconsideration and stated that her date-of-injury salary of \$38,491.00 was based on the grade of 47K step 2 rather than 46K step 2. She also alleged that the employing establishment was currently paying her at an incorrect rate and that she did not return to work with retained pay.

On January 20, 2004 appellant resubmitted her reconsideration request alleging that she was being paid at the incorrect rate as the employing establishment was not paying her based on her retained pay rate.

By decision dated March 17, 2004, the Office reviewed appellant's claim on the merits and denied modification of its October 4, 1999 wage-earning capacity decisions.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.¹

Section 8115(a) of the Federal Employees Compensation Act² provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. Generally wage actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.³

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to work-related injury of disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁴ The procedure manual provides in relevant part as follows:

"Factors Considered. To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty ... are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable."⁵

¹ *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

² 5 U.S.C. §§ 8101-8193, § 8115(a).

³ *Selden H. Swartz*, 55 ECAB ____ (Docket No. 02-1164, issued January 15, 2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

The formula for determining loss of wage-earning capacity based on actual earnings,⁶ which developed in *Albert C. Shadrick*,⁷ has been codified by regulation at 20 C.F.R. § 10.403.⁸ Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.⁹

Under 5 U.S.C. § 8101(4), “‘monthly pay’ means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”¹⁰

ANALYSIS

In reaching its loss of wage-earning determination, the Office found that appellant had actual earnings in the modified distribution clerk position, that she had worked in this position for more than 60 days, that this position was equivalent in appointment and tour of duty to her date-of-injury position, that the medical evidence supported that this position was within her work restrictions and that this position represented her wage-earning capacity. The Board finds no evidence that appellant's actual earnings as a modified distribution clerk, do not fairly and reasonably represent her wage-earning capacity. The medical evidence from appellant's physician, Dr. Provenza, a Board-certified neurosurgeon, supports that she could perform the duties required by this position. The Board finds that the Office's original decision finding that this position was an appropriate basis for determining appellant's wage-earning capacity was correct.

In requesting modification of her wage-earning capacity determination, appellant has not alleged and the medical evidence does not support a material change in the nature and extent of her injury-related condition. She also fails to allege that she has been vocationally rehabilitated. Instead appellant asserts that the original wage-earning capacity determination is in error as the Office utilized an incorrect pay rate.¹¹

Appellant has repeatedly disagreed with the rate of pay for compensation purposes. She asserts that her date-of-injury pay rate was based on a 47K step 2 position with a pay rate of \$38,491.00 rather than a 46K step 2 position as found by the Office. There are several notices of personnel action in the record indicating varying pay rates and positions for appellant. She submitted a copy indicating that her date-of-injury position was 47K step 2. However, the Office

⁶ *Hayden C. Ross*, 55 ECAB ____ (Docket No. 04-136, issued April 7, 2004).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403.

⁹ 20 C.F.R. § 10.403(d).

¹⁰ 5 U.S.C. § 8101(4).

¹¹ Appellant has not argued that she is entitled to a recurrent pay rate and the Board notes that she did not return to full duty after her return to work in July 1994. *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

made inquiries of the employing establishment and the employing establishment submitted a copy of a notification of a personnel action from appellant's official file noting that her position at the date of injury was rated as 46K step 2. The Board finds that the employing establishment's official documentation of appellant's rate of pay at the time of injury must be determinative.¹²

In determining the wage-earning capacity based on actual earnings as developed in the *Shadrick*, decision, the Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current date-of-injury pay rate. In the instant case, the Board finds that the Office properly used appellant's actual earnings of \$780.40 per week and a current pay rate for her date-of-injury job of \$772.00 per week. The Office properly determined that appellant had no loss of wage-earning capacity and was not entitled to further wage-loss compensation benefits.

Appellant has argued that the employing establishment has and is paying her incorrectly in her modified position. Neither the Office nor the Board has jurisdiction over the employing establishment's payment of salaries. Jurisdiction is limited to determining pay rate for compensation purposes only.¹³

CONCLUSION

The Board finds that the Office properly denied modification of its wage-earning capacity determination as the Office used the correct rate of pay in determining appellant's compensation benefits and properly adjusted her wage-earning capacity to reflect the receipt of actual wages in her modified distribution clerk position.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.2.d(2) (December 1995).

¹³ Neither the Office nor the Board has the authority to enlarge the terms of the Act. *Leona B. Jacobs*, 55 ECAB ____ (Docket No. 04-1429, issue September 30, 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member